Office - Supreme Court, U.S.
FILED
AUG 1 1983
ALEXANDER L. STEVAS
CLERK

83-220

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOYLE NATIONS and MARIE NATIONS
Petitioners,

v.

SUN OIL COMPANY (DELAWARE) and
SUN PRODUCTION COMPANY
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

*C. R. MCRAE
HENRY P. PATE, III
825 Jackson Avenue
P.O. Box 1692
Pascagoula, MS 39567
(601) 762-3168

**Counsel of Record*

ALFRED LEE FELDER
P.O. Box 1261
McComb, MS 39648
(601) 684-3119/3362
Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether F.R.A.P. 28 (j) allows an appellant to make a new assignment of error and argument thereon after all briefs have been filed, but before oral arguments, when original briefs did not contain such assignment of error or argument.

2. Whether offensive collateral estoppel [*Parklane Hoisery Company, Inc.* v. *Shore*, 349 U.S. 322, 99 S.Ct. 645, 58 L. Ed. 2d 552 (1979)] estopping the defendants from relitigating negligence and affirmative defenses estopped the defendants from raising an affirmative defense issue post briefs when there was a change in law, or if newly announced Fifth Circuit doctrine of "equitable discretion" allowed issue to be raised post briefs, but before oral argument.

3. Whether the Fifth Circuit Court of Appeals correctly applied the holding of *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 99 L.Ed.2d 296 (1971) concerning nonretroactivity to a change in state law arising after verdict and all appellants' briefs were filed, but before oral argument.

a. If appellants were excused from raising the issue because of a change in law, was judgment a vested property right especially after rejecting substantial, but inadequate, settlement.

b. If the change in law was foreshadowed by trend of law in state decisions, so as to make nonretroactive application of *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 92 S. Ct. 349, 99 L. Ed. 2d 296 (1971), inapplicable to plaintiff, can defendant be excused for failure to raise alleged error in post trial motions, assignment of errors and briefs before the Appellate Court.

4. Whether the application of *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), as allowed by the Fifth Circuit Court of Appeals is in conflict with this Court's decision in that case, and the decisions of other circuits.

Parties In Court Below

Plaintiff Doyle Nations and wife, Marie Nations, sued Sun Oil Company (Delaware) and Sun Production Company, hereinafter Sun Oil, for negligence and damages. Sun Oil, by third party action, made Mississippi Welding Service, Inc., as Doyle Nations' employer, a third party defendant. Mississippi Welding was dismissed by summary judgment on grounds of *res judicata* and Sun Oil did not appeal from the summary judgment. Therefore, Mississippi Welding did not participate at trial.

Home Insurance Company, workmen's compensation carrier for Mississippi Welding, intervened to recover workmen's compensation benefits paid on behalf of Mississippi Welding. Home Insurance Company did not participate in the initial appeal of this cause since the issues raised by Sun Oil's assignment of errors and brief dealt primarily with questions of the amount of recovery. When the court of appeals granted Sun Oil a new assigned error and brief under rule 28 (j) and issued a decision which possibly extinguished Home Insurance Company's (Mississippi Welding's) rights to recover as well as those of Doyle and Marie Nations, then Home Insurance Company attempted to file a Petition for Rehearing Out of Time. The Court of Appeals denied this petition.

Sun Oil is insured by Royal Globe Insurance Companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN COURT BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
PROVISIONS, STATUTES, AND SUPREME COURT DECISIONS INVOLVED	3
STATEMENT OF THE CASE	3
1. Proceeding Below	3
a. U.S. District Court	3
b. Circuit Court of Appeal	5
2. Facts	5
REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	6
I. THE FIFTH CIRCUIT COURT OF APPEALS ALLOWED SUN OIL COMPANY TO ASSIGN AND BRIEF AN ABANDONED ISSUE UNDER F.R.A.P. 28(j) THUS EXCEEDING THE PURPOSE AND SCOPE OF RULE 28(j)	6
II. DID THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLY THE NONRETROACTIVITY HOLDING OF *CHEVRON OIL COMPANY* V. *HUSON* TO THE *DOUBLEDAY* DECISION, ULTIMATELY EXTINGUISHING NATIONS' CAUSE OF ACTION	7
CHEVRON OIL COMPANY V. *HUSON* DOES APPLY	8
1. Change Of Law	8
2. Inequitable Result	8
III. CERTIORARI SHOULD BE GRANTED TO THE APPEALS COURT BECAUSE THE APPEALS COURT'S DECISION REJECTED THE HOLDING OF *PARKLANE HOISERY COMPANY* V. *SHORE*, 349 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, CONCERNING OFFENSIVE COLLATERAL ESTOPPEL	10
CONCLUSION	13

Table of Contents Continued

Page

APPENDIX A 1a
APPENDIX B 12a
APPENDIX C 17a
APPENDIX D 18a

TABLE OF AUTHORITIES

CASES: Page

Chevron Oil Company v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 99 L.Ed.2d 296 (1971) ... i, ii, 2, 3, 7, 8, 9, 10, 12

Doubleday v. *Boyd Construction Company*, 418 So.2d 823 (Miss. 1982) 2, 5, 7, 8, 9

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) .. 2, 12, 13

Harris v. *Plastics Mfg. Co.*, 617 F.2d 438 (CA5 Tex. 1980) 7

In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 433 (CA5 Tex. 1982) 7

Nations v. *Sun Oil Company (Delaware)* 695 F.2d 933 (CA5 Miss. 1983), *rehearing den.*, 705 F.2d 742 (CA5 Miss. 1983) 1, 2, 4, 8

Parklane Hosiery Company, Inc. v. *Shore*, 349 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) . i, 2, 3, 10, 12, 13

Simpson v. *Union Oil Company of California*, 411 F.2d 897 (CA9 Cal. 1969), *rev. on other gnds.*, 396 U.S. 13, 90 S.Ct. 30, 30 L.Ed.2d 13 7

Stretton v. *Penrod Drilling Co.*, 701 F.2d 441 (CA5 La. 1983) 2, 10

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

Article III, § 2, clause 1 U.S. Constitution 3

Rule 28(j) Federal Rules of Appellate Procedure ii, 3, 6, 13

28 U.S.C. § 2101(c) 3

28 U.S.C. § 1254(l) 3

28 U.S.C. § 1332 3

§ 71-3-7 Mississippi Code 1972 8

§ 71-3-71 Mississippi Code 1972 4

§ 71-3-71(d) Mississippi Code 1972 ..... 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-____

DOYLE NATIONS and MARIE NATIONS
Petitioners,

v.

SUN OIL COMPANY (DELAWARE) and
SUN PRODUCTION COMPANY
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners, Doyle and Marie Nations, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in its cause number 82-4041.

OPINION BELOW

The opinions below are:

(1) Doyle Nations and Marie Nations v. Sun Oil Company (Delaware) and Sun Production Company, 695 F. 2d 933 (1983), and

(2) On Petition for Rehearing and Suggestion of Rehearing En Banc, 705 F.2d 742 (1983).

On January 20, 1983, the United States Court of Appeals for the Fifth Circuit, utilizing federal law, con-

sidered an intervening decision, *Doubleday* v. *Boyd Construction Co.*, 418 So.2d 823 (Miss. 1982), submitted by Sun Oil thirteen (13) days before oral argument under Rule 28(j) Federal Rules of Appellate Procedure, upon a matter admittedly neither raised by post-trial motion, nor assigned and brief as error on appeal [695 F.2d 936]. The Court of Appeals vacated the District Court judgment and remanded the cause for further proceedings. This opinion is reported at 695 F.2d 933 (CA5 Miss. 1983) and a copy is attached hereto as Appendix "A."

On May 23, 1983, the United States Court of Appeals for the Fifth Circuit denied Petitioners' Petition for Rehearing and Petition of Rehearing *En Banc* despite Petitioners' vigorous arguments that this Court had prohibited such actions in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 99 L.Ed.2d 296 (1971), *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 99 S.Ct. 651, 58 L. Ed. 552 (1979), and *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) and that it conflicted with its own decision of *Stretton* v. *Penrod Drilling Co.*, 701 F2d 441 (CA5 La. 1983). The Court of Appeals denied the Petitions but did modify its original opinion as to the damages accorded to Marie Nations [765 F.2d 745]. This opinion is reported at 705 F.2d 742 (CA5 Miss. 1983) as Appendix "B."

Intervenor/Appellee then filed a Petition for Rehearing Out of Time on the ground of *res judicata* and this petition was denied on July 13, 1983 and a copy is attached hereto as Appendix "C."

Copies of the Judgement and stay of mandate are attached as Appendix "D."

JURISDICTION

Petitioners were Plaintiffs/Appellees in the United States Court of Appeals for the Fifth Circuit. This Peti-

tion is timely filed within ninety (90) days of the denial of rehearing. The case was decided January 20, 1983, and petition for rehearing and suggestion for rehearing en banc were denied May 23, 1983. Supreme Court Rules 20 [28 U.S.C. § 2101(c)]. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1). and Art. III, § 2, cl. 1 of the United States Constitution.

PROVISIONS, STATUTES, AND SUPREME COURT DECISIONS INVOLVED

1. 28 U.S.C., Federal Rules of Appellate Procedure, Rule 28(j)

(j) Citation of Supplemental Authorities: When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

2. *Chevron Oil Company* v. *Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

3. *Parklane Hoisery Company, Inc.* v. *Shore*, 349 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552.

STATEMENT OF THE CASE

1. Proceedings Below

a. U.S. District Court

This case originated as a diversity action under 28 U.S.C. § 1332.

Doyle Nations, Marie Nations, his wife, and The Home Insurance Company sued Sun Oil Company (Delaware) and Sun Production Company, hereinafter Sun Oil, to recover damages arising out of the March 3, 1977, explosion and fire at its gas well near Bassfield, Mississippi. Doyle nations was set ablaze and suffered second and third degree burns. Nations was the lone survivor of three (3) workmen injured in the explosion [695 F.2d 935]. The Home Insurance Company intervened [§ 71-3-71 Mississippi Code 1972] to recover compensation payments.

Sun Oil had raised the "statutory employer" defense [§ 71-3-7(d) Mississippi Code 1972] in the prior wrongful death trials of the other two (2) workmen. Both of these actions resulted in judgments against Sun Oil and findings of no negligence against Mississippi Welding Service, Inc. and its employees. Sun Oil did *not* appeal either of these judgments and paid both judgment amounts into court [695 F.2d 935]. The Home Insurance Company recovered a portion of each of those judgments pursuant to § 71-3-71 Mississippi Code 1972.

Based upon the two (2) prior judgments, the District Court held that Sun Oil was offensively collaterally estopped to deny its liability or to raise any affirmative defenses, including the "statutory employer" defense [695 F.2d 935-936, 938]. This cause was tried upon the issue of damages only [695 F.2d 936].

At the Nations' Motion for Partial Summary Judgment, Sun Oil did not present any evidence in opposition. At trial, Sun Oil's representative and the representative of Mississippi Welding Service, Inc., hereinafter Miss. Welding, testified, but Sun Oil did not question them relating to the "statutory employer" defense nor did Sun Oil to raise this defense by proffer. [695 F.2d 937]. The

jury returned a $500,000 verdict for Doyle Nations and a $150,000 verdict for Marie Nations [695 F.2d 935].

b. Circuit Court of Appeals

Sun Oil appealed primarily upon the issue of offensive collateral estoppel and did *not* raise any error regarding the "statutory employer" defense [§ 71-3-7(d) Mississippi Code 1972] [695 F.2d 936].

The Circuit Court affirmed the District Court's application of offensive collateral estoppel [695 F.2d 938].

The Court of Appeals held that the judgment must be vacated and remanded for further consideration of the "statutory employer" defense in light of *Doubleday* v. *Boyd Construction Company*, 418 So.2d 823 (Miss. 1982). *Doubleday* was decided *after* the entry of final judgment in the District Court and *after* the expiration of the period for submitting briefs to the Circuit Court of Appeals [695 F.2d 936]. The Circuit Court ruled that *Doubleday* was "a first-time application of long-standing statutory law" [705 F.2d 744).

2. Facts

On March 3, 1977, Doyle Nations and two (2) other workmen were employees of Miss. Welding who had contracted with Sun Oil to construct natural gas wellhead production facilities at Sun Oil's well site owned and controlled by Sun Oil.

The work was performed without a written contract for this specific purpose. Miss. Welding was not continuously employed by Sun Oil. Miss. Welding was an independant contractor having exclusive control of its employees.

Sun Oil negligently allowed an explosive mixture to remain within the facilities' storage tanks without suffi-

cient safety devices to prevent its ignition. In the ensuing explosion Nations suffered second and third degree burns together with other permanent physical and mental injuries.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE FIFTH CIRCUIT COURT OF APPEALS ALLOWED SUN OIL COMPANY TO ASSIGN AND BRIEF AN ABANDONED ISSUE UNDER F.R.A.P. 28(j) THUS EXCEEDING THE PURPOSE AND SCOPE OF RULE 28(j).

The Court of Appeals decided an important question of Federal Law which has not been, but should be, settled by this Court.

The Fifth Circuit Court of Appeals allowed a letter under Rule 28(j) to be used to assign an issue and to brief that issue when that issue had been abandoned. Such construction of Rule 28(j) F.R.A.P. is contrary to the purpose of the rule and the law of that circuit and other circuits.

The literal language of F.R.A.P. 28(j) is that:

> (j) Citation of Supplemental Authorities: When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. *There shall be a reference either to the page of the brief or to a point argued orally* to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

The Fifth Circuit Court of Appeals has held that any contention that a trial court erred in denying certification

of a class was abandoned, where appellants did not discuss the issue in their brief on appeal. *Harris* v. *Plastics Mfg. Co.*, 617 F.2d 438,(CA. 5 Tex. 1980). Similarly, issues not discussed in briefs, although referred to in statement of case and specifications of error, were deemed abandoned and need not be considered. *Simpson* v. *Union Oil Company of Cal.*, 411 F.2d 897 (CA. 9 Cal 1969) *reversed on other grounds*, 396 U.S. 13, 90 S.Ct. 30, 30 L. Ed. 2d 13. Where plaintiff in anti-trust action offered no response to support its conspiracy claim and neither its principal brief or reply brief contained arguments setting forth its contentions and accompanying reasons with respect with its conspiracy claim, such claim would be deemed abandoned. *in re Municipal Reporting Anti-Trust Litigation*, 672 F.2d 433 (CA Tex. 1982).

II.

DID THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLY THE NONRETROACTIVITY HOLDING OF *CHEVRON OIL COMPANY* v. *HUSON* TO THE *DOUBLEDAY* DECISION, ULTIMATELY EXTINGUISHING NATIONS' CAUSE OF ACTION.

The Fifth Circuit Court of Appeals has rendered a decision on a federal question in conflict with the applicable decisions of this Court.

Chevron Oil Company v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L. Ed. 2d 296, (1971) was a Fifth Circuit Court of Appeals decision in which this Court set forth the test for nonretroactivity concerning a change in the law. Decisions are not to be applied retroactively if:

> (1) the decision to be applied establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was clearly not foreshadowed;

(2) retroactive application will not further the purpose of the Rule; and

(3) retroactive application could produce substantial and inequitable results.

In its supplemental authority, Sun Oil claims that *Doubleday* "held for the first time" that § 71-3-7 Mississippi Code 1972 provided that Workmen's Compensation was the exclusive remedy under the facts in the case. In his response, Nations contended that *Doubleday* "changed the law in the State of Mississippi."

If there was no change in the law as ruled by the Fifth Circuit so as to reach the test of *Chevron Oil Company* v. *Huson*, then it is clear that the statutory defense was an abandoned issue or waived issue because of the failure of Sun Oil Company to raise the issue on its Motion for Judgment n.o.v., its assignments of error, or on its appellants' briefs. [The Fifth Circuit admits *Doubleday* was a "a first time application fo the statutory law to the facts present here." *Nations* v. *Sun Oil Company*, (Delaware) 705 F.2d 742 at 744].

CHEVRON OIL COMPANY V. HUSON DOES APPLY

(1) Change Of Law

Since the adoption of Workmen's compensation in Mississippi in 1948, an injured employee who was provided Workmen's Compensation by his employer has always been able to sue the prime contractor or premises' owner for the negligence of those persons, and other third parties. *Doubleday* changed the law.

(2) Inequitable Result

Retroactive application would produce a substantially inequitable result to Nations because relying upon the law as it existed at trial, Nations rejected an inadequate,

but substantial offer, of $200,000.00, and submitted his damages claim to the jury. $200,000.00 is approximately four (4) times the maximum Workmen's Compensation Nations could have expected to receive.

The appeals court contention that it was unfair to employers to saddle it with a liability to which it had no incentive to personally insure, was contrary to the law of Mississippi and to the facts in the present case. The insurer of Sun Oil Company, Royal Globe Insurance, had not appealed and had paid two (2) judgments previously arising from its negligence in the explosion.

(3) The third test under *Chevron Oil Company* v. *Huson* as set out in that case is:

> It has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation."

In this regard employers of contractors and subcontractors in Mississippi have historically insured themselves for general liability and premises liability for its own acts of negligence. As stated by the Mississippi Supreme Court in *Doubleday* v. *Boyd Construction Company*, 418 So.2d 823 at 825:

> The primary intention of the statute was held to be for the protection of employees of independent contractors or subcontractors who were not financially responsible and this laudable purpose was aided by preventing general contractors from relieving themselves of workmen's compensation responsibility by shifting it to others.

That had been the interpretation of the statute since 1952. During its entire time, it had not been used to reclude a cause of action such as the Nations' action. The

purpose of the new interpretation will not be impaired in Mississippi by allowing persons such as Doyle Nations who have actively started their claims and, as in his case, obtained verdicts, because the real purpose of the rule is to secure compensation to the employees. Until the interpretation in *Doubleday*, third party recovery was never denied to subcontractor's employees when negligence was proven. Historically such third parties had obtained liability insurance to cover acts of negligence toward subcontractor employees. The purpose and operation of the rule will not be impeded by nonretroapplication of *Doubleday* to the Nations decision and like cases.

Conversely, retroactive application of the longstanding statutory law to this case which was vigorously prosecuted to judgment and detrimentally relied upon to reject substantial settlement offers, would deprive Nations "of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." [*Chevron Oil Company* v. *Huson*, 404 U.S. 97 at 108, 92 S.Ct. 349 at 356.]

The Fifth Circuit recently relaxed the rules of *Chevron Oil Company* v. *Huson* by finding that only two of the three points need be present in order to find nonretroapplication appropriate. *Stretton* v. *Penrod Drilling Company*, 701 F.2d 441 (CA 5 La. 1983).

III.

CERTIORARI SHOULD BE GRANTED TO THE APPEALS COURT BECAUSE THE APPEALS COURT'S DECISION REJECTED THE HOLDING OF *PARKLANE HOISERY COMPANY* v. *SHORE*, 349 U.S. 322, 99 S.Ct. 645, 58 L. Ed.2d 552 (1979), CONCERNING OFFENSIVE COLLATERAL ESTOPPEL.

The Fifth Circuit Court of Appeals has decided an important question of federal law concerning offensive

collateral estoppel which is in conflict with applicable decisions of this Court.

The applicability of collateral estoppel is conditioned upon three requirements:

1. That the issue to be concluded be identical to that involved in the prior action; and

2. That in prior action the issue was fully litigated; and

3. That the determination of the issue was necessary and essential to the resulting judgment in the prior action.

The trial court correctly applied offensive collateral estoppel because the above three tests were met. In ordering offensive collateral estoppel the trial judge estopped Sun Oil from relitigating its negligence and the affirmative defenses raised by it. One of the affirmative defenses was that of "statutory employer."

Sun Oil Company on the Motion for Partial Summary Judgment on offensive collateral estoppel brought no new facts or arguments of law to the trial court, but relied upon its position as stated and attempted to be proved in the two (2) prior cases. In these cases Sun Oil attempted to prove a statutory defense based upon the theory that Sun Oil had the right to control the workers and the details of the work. The jury necessarily found in its decision that Mississippi Welding was an independent contractor and its employees were not subject to the control of Sun Oil, thus no statutory employer relationship existed. No further contentions were made upon this issue in Nations until thirteen (13) days before oral argument. Sun Oil raised and briefed that issue even though it had been abandoned since motion for partial summary judgment based on offensive collateral estoppel.

Sun Oil was estopped from relitigating any issue that was necessary and essential to the resulting judgment in the prior action. The defense of "statutory employer" as presented in the two (2) prior cases would have prevented judgments in those cases. The jury found that Sun Oil was *not* the "statutory employer" of the other two (2) workmen. Sun Oil did *not* appeal either jury verdict. The judgments became the law of the case and Sun Oil was barred by *res judicata* from raising this defense in Nations' case. Home Insurance Company was a party to all three (3) trials. The Court of Appeals erred in denying its Petition for Rehearing on grounds of *res judicata*. Thus, *Parklane Hoisery Company Inc.*, v. *Shore* precluded Sun Oil from raising the "statutory employer" defense in Nations.

If Sun Oil argues that they were unaware that the law was going to be changed, or that they could not foresee the coming change in the law, than how was Nations to foresee that which Sun Oil could not foresee? In that event, the Nations case falls under *Chevron Oil Company* v. *Huson* and meets the three point test there, and meets the *res judicata* test of *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

CONCLUSION

Certiorari is appropriate in this case because the Fifth Circuit Court of Appeals engrafted an equitable exception to the doctrine of offensive collateral estoppel in violation of *Parklane Hoisery Company, Inc.* v. *Shore*, 349 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 and *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

The Fifth Circuit Court of Appeals further construed Rule 28(j) 28 U.S.C.A. Rules of Appellate Procedure to allow abandoned and waived issues to be revived by supplemental letter subsequent to all briefs being submitted. Such a construction of the law is contrary to the literal reading of the statute and contravenes long established principles of abandonment and waiver of issues for failure to preserve through motions for new trials, judgment n.o.v., or assignments of error and briefs. These important issues are ripe for decision by this Court.

The Appeals Court has departed from the accepted and usual course of construction and application of nonretroactivity and continues its historical course of an application which produces the most inequitable results.

Certiorari is the last "safety net" available to Doyle and Marie Nations to preserve their day in court and redress for proven serious injury.

Dated this the August 1, 1983.

Respectfully submitted,

ALFRED LEE FELDER
P.O. Box 1261
McComb, MS 39648
(601) 684-3119/3362
Attorneys for Petitioners

*C. R. MCRAE
HENRY P. PATE, III
825 Jackson Avenue
P.O. Box 1692
Pascagoula, MS 39567
(601) 762-3168

**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Jan. 20, 1983

No. 82-4041

DOYLE NATIONS and MARIE NATIONS,
Plaintiffs-Appellees,

v.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Defendants-Appellants.

Welding company employee sued oil company to recover for personal injuries sustained in explosion at oil well site. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., rendered judgment for employee on jury award, and oil company appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) remand was required for a determination of whether oil company was a statutory employer; (2) finding in prior action involving other injured employees that oil company was negligent could be used offensively under doctrine of collateral estoppel; (3) trial court's response, in absence of counsel, as to jury's inquiry whether they needed to discount figure for full compensation was prejudicial; and (4) permitting compensation carrier's claims supervisor to testify as to amount of compensation benefits and that medical expenses were reasonably necessary was harmless error.

Vacated and remanded.

D. Gary Sutherland, Hattiesburg, Miss., for defendants-appellants.

C.R. McRae, Pascagoula, Miss., Alfred Lee Felder, McComb, Miss., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, RUBIN and WILLIAMS, Circuit Judges.

CLARK, Chief Judge:

Doyle Nations is the last of three employees of Mississippi Welding Service to sue Sun Oil Company as a result of an explosion at an oil well site. He is also the only survivor of the trio. A jury awarded verdicts of $500,000 to Nations and $150,000 to his wife Marie. Sun Oil appeals the consequent judgments on a number of grounds, but most importantly because of a supervening decision of the Mississippi Supreme Court. This decision requires that the district court's judgments must be vacated and the action remanded to permit a proper determination of whether the status of Nations' employer made him a statutory employee of Sun Oil.

I. The Facts Of The Case

Doyle Nations, Miller Howell, and Leon Falcone went to the G.L. Dean No. 1 well site on March 3, 1977 to work on a tank battery. Mississippi Welding, their employer, was under contract with Sun Oil to perform general maintenance and repair work at the well site. On March 3, the men were constructing a vent line for the tank battery. The afternoon weather was miserable as a rain storm moved across southern Mississippi. The workers were said to have heard the rumble of thunder prior to the explosion which rocked the well site. One 210-barrel tank exploded killing Howell and Falcone. Nations was set ablaze. He crawled into a slush pit on the site to extinguish the fire. Nations suffered second and third degree burns to 10% of his body and was later diagnosed to have suffered a shoulder injury, loss of hearing in his left ear and a permanent, but partial, psychiatric disability.

The estates of Howell and Falcone brought wrongful death suits against Sun Oil. Sun Oil filed a third party complaint against Mississippi Welding alleging that the negligence of

Mississippi Welding's employees was the sole proximate cause of the explosion. The jury found that Mississippi Welding was not negligent and placed all liability upon Sun Oil. The jury granted money damages to both estates.

Doyle Nations' negligence suit against Sun Oil was tried separately and subsequently. His attorneys sought and the judge granted a partial summary judgment on the issue of liability. The judge approved the offensive use of collateral estoppel holding that Sun Oil was bound by the jury's findings in the earlier case. The case went to trial on damages alone.

II. Change In The Law

After filing its appellants' and reply briefs in this appeal, it came to the attention of Sun Oil that the Mississippi Supreme Court in *Doubleday* v. *Boyd Construction Co.*, 418 So.2d 823 (Miss.1982), had recently altered Mississippi's workmen's compensation law granting immunity from tort suits for contractors that require their subcontractors to carry workmen's compensation insurance. Sun Oil submitted that case to this court as a supplemental authority under Fed.R.App.P. Rule 28(j). Because this court must apply the law current at the time of its decision, the *Doubleday* decision binds this court. *Concerned Citizens of Vicksburg* v. *Sills*, 567 F.2d 646, 649-50 n. 5 (5th Cir.1978); *United States* v. *Scardino*, 414 F.2d 925, 927 (5th Cir.1969).

Doubleday construes the statute granting immunity from tort suit to a general contractor that requires its subcontractors to provide workmen's compensation benefits. Despite Sun Oil's failure to raise a statutory employer defense in its motion for judgment notwithstanding the verdict or in its appellate briefs, it did raise this defense as an alternative affirmative defense in its answer to the complaint. It did not urge the issue again until after briefing was complete. The assertion of *Doubleday* as a supplemental authority prior to the argument of this case, however, provided Nations the opportunity to discuss *Doubleday* in a response it later filed.

The question was fully argued before this court. The appellee was not misled and the issue was fully explored in supplemental briefs and at oral argument. The court will consider the issue.

III. *Doubleday* And The Statutory Employer

The workmen's compensation law of Mississippi provides that "in the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment." Miss.Code Ann. § 71-3-7. If the subcontractor has not secured such payment, then the statute considers the contractor to be the employer of the subcontractor's employees. The contractor is made liable for the payment of workmen's compensation benefits, and is accordingly made immune from tort action brought by the employee of the subcontractor. *Mills* v. *Barrett*, 213 Miss. 171, 56 So.2d 485 (1952). The contractor becomes immune because workmen's compensation is an employee's exclusive remedy against his employer. Miss.Code Ann. § 71-3-9.

Where the subcontractor has fewer than the number of employees required by the statute to be liable for workmen's compensation payments to the employee, the Supreme Court still will hold the general contractor liable for workmen's compensation payments and again recognize that he has immunity from tort suit brought by an employee of the exempt subcontractor. *Jackson* v. *Fly*, 215 Miss. 303, 60 So.2d 782 (1952); *Mills* v. *Barrett*, *supra*.

A third possible situation is where the subcontractor qualifies as an employer under the Act. Once denoted an employer, the subcontractor is liable for workmen's compensation payments but receives immunity from tort suits brought by employees. Miss.Code Ann. § 71-3-9. However, the employee receiving workmen's compensation benefits, is only barred from bringing suit against his employer and the employer's insurance carrier. He still has the right to "sue any other party at law." Miss.Code Ann. § 71-3-71.

The question presented here is: if the employee is covered by workmen's compensation benefits from the subcontractor, is the general or prime contractor a "third party" against whom a tort action may be brought?

In *Doubleday*, the Mississippi Supreme Court held the general or prime contractor that requires its subcontractors to protect their employees by providing workmen's compensation coverage is immune from suit.

> It would be paradoxical, however, in our opinion, to hold as the appellant entreats that a general contractor risk personal injury judgments in common law suits if he complies with the statute by contractually securing compensation insurance by his subcontractor, but if he lets work to subcontractors who do not comply with the Act, than his liability is limited to the sums provided by the Act. We do not think the legislature intended such an improbable result.

418 So.2d at 826. The Court agreed with the Florida Supreme Court's interpretation of its differently worded workmen's compensation statute. "It is our opinion the legislature did not intend to subject a general contractor to common law liability if he complied wth § 71-3-7 by requiring the subcontractor to have Workmen's Compensation insurance." *Id.* The *Doubleday* court concluded that the situation presented was identical to *Mosley* v. *Jones*, 224 Miss. 725, 80 So.2d 819 (1955). Mosley protected himself from common law tort liability by procuring workmen's compensation insurance for the employees of his subcontractor. Boyd, the general contractor in *Doubleday*, accomplished the same end by contractually requiring Ratliff, the subcontractor, to secure a policy of insurance on its employees. Therefore, the court held, Boyd "secured" compensation insurance for Doubleday within the meaning of the Act.

Whether *Doubleday* applies to this case depends on the answer to two questions: (1) did Sun Oil require Mississippi Welding to have workmen's compensation insurance for the protection of its employees, and (2) is Sun Oil a contractor and is Mississippi Welding a subcontractor within the meaning of

Doubleday so as to make Nations a statutory employee of Sun Oil under Mississippi law. If Sun Oil was a contractor that required its subcontractor Mississippi Welding to protect its employees by providing workmen's compensation protection then *Doubleday* bars this tort action by Nations against Sun Oil.

The contract between Sun Oil and Mississippi Welding stated that Mississippi Welding should provide workmen's compensation insurance "if [it was] applicable." The only logical reading of "if applicable" would require Mississippi Welding to carry workmen's compensation insurance under Miss. Code Ann. § 71-3-5 if it is an employer of eight or more persons.[1] Under this meaning Sun Oil plainly required that compensation insurance be carried by Mississippi Welding.

The test of *Doubleday's* application to today's case, therefore, narrows to determining whether Sun Oil is a general contractor and Mississippi Welding is a subcontractor and Mississippi Welding is a subcontractor. Under Mississippi law, a subcontractor "is one who enters into a contract, express or implied, for performance of an act with a person who has already contracted for its performance, or who takes a portion of a contract from the principal or prime contractor." *Rodgers* v. *Phillips Lumber Co.*, 241 Miss. 590, 593, 130 So.2d 856, 857 (1961). The fact that the contract involved in this case characterizes Mississippi Welding as an independent contractor is not critical because an independent contractor may be a subcontractor for the purposes of workmen's compensation. *Corban* v. *Skelly Oil Co.*, 256 F.2d 775, 779 (5th Cir. 1958).

Our ability to determine whether Mississippi Welding is a subcontractor is thwarted by an incomplete record. The controlling fact is Sun Oil's relationship to the property and minerals at the G.L. Dean Well Site. The record offers no proof of that relationship. Prior to oral argument, Sun Oil asserted in this court that it was the lessee of the mineral rights at the site.

---

[1] The statute has been amended since this accident lowering the number of employees required from eight to five.

If this statement is corroborated or conceded, that may be sufficient to make Mississippi Welding a subcontractor, for the lease of mineral rights carries an implied covenant that the lessee will exercise the duty of a prudent operator to develop leased minerals. *Wells* v. *Continental Oil Co.*, 244 Miss. 509, 142 So.2d 215, 221 (1962). If Sun Oil undertook this duty then the contract between Sun Oil and Mississippi Welding would be a subcontract in which Mississippi Welding contracted to perform a portion of the activity Sun Oil was already contractually obligated to perform. If, however, Sun Oil's relationship to the property is different, it may not be able to claim it is contractually bound to develop the minerals on the property. If that is true, and assuming no other contract relationship to work be shown, Mississippi Welding might not be a subcontractor that had assumed duties which Sun Oil was already obligated to perform.

Therefore, we vacate the district court decision and remand for a determination of whether Sun Oil was the lessee of the mineral rights and whether Mississippi Welding was a subcontractor. Since the case must go back to the trial court for further proceedings, the interests of justice require that we consider other issues raised on the present appeal.

IV. Offensive Collateral Estoppel

Sun Oil asserts that the district court improperly used offensive collateral estoppel to bar trial of the liability issue. We disagree. Should the district court find that Sun Oil was not a statutory employer immune from tort suit, it need only deal with the cause of damages, for the district court properly decided the liability issue.

The party asserting collateral estoppel must show:

(1) That the issue to be precluded is identical to the one involved in the prior litigation involving the party against whom estoppel is asserted;

(2) That the issue was actually litigated and determined adversely to that party in the prior litigation; and,

(3) That the determination of the issue was a critical and necessary part of the judgment in that prior action.

Rufenacht v. *Iowa Beef Processors, Inc.*, 656 F.2d 198, 202 (5th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1279, 71 L.Ed.2d 462 (1982). The issue sought to be precluded in this case is whether Sun Oil was negligent. The jury in the previous cases found Sun Oil to be negligent, and cleared Mississippi Welding of any blame. Therefore, Nations, whose only association with the well site was in the course and scope of his job as a Mississippi Welding employee, could not have been negligent. The negligence issue was actually litigated in the prior action as part of the third party action asserted by Sun Oil. It was a critical and necessary finding because the jury had to assess negligence to award damages.

The appellant argues that Nations "sand-bagged" Sun Oil by delaying the filing of his case until the resolution of the prior wrongful death cases. There is no proof of purposeful delay. Nations was entitled to await the development of his injuries and their predictable consequences. Even if Nations intentionally delayed for a period less than permitted by Mississippi's statute of limitation, such action was not shown to be fundamentally unfair. Sun Oil had a full, fair and complete opportunity to litigate the negligence issue during the Howell and Falcone trials. They have no right to a second bite of the apple.

V. Conflicting Instructions

Sun Oil also asserts that the district judge erred by responding to two questions from the jury during its deliberations on damages without notifying counsel and by offering conflicting responses.

When the jury submits a question to the judge, counsel should be informed of its substance and be afforded an opportunity to be heard before the answer is given. *Rogers* v. *United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); *United States* v. *McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). However,

the court in *McDuffie* acknowledged that this type of judicial error may be harmless. *Id.* This court later expanded on the harmless error exception in *United States* v. *Breedlove*, 576 F.2d 57 (5th Cir.1978). In *Breedlove*, the court stated that it does not approve of situations where a trial judge responds to a jury question without notifying counsel. However, when this happens, the action may be gauged harmless if the judge's answer was distinctly responsive to the jury's inquiry, clearly stated the law and no prejudice is shown. *Id.* at 60. The judge's answers here were clearly responsive, so the issues are whether they clearly stated the law and whether they were prejudicial.

The jury sent two questions to the district judge. The first asked, "Do we have to discount our figure to Rule 12 before we submit our final figures." The judge responded "Yes." Both parties agree that this first answer was correct. The jury later wrote: "Need an explanation as to how to arrive at this figure. We have agreed on a figure for full compensation. Do we need to discount this figure." The judge responded "No."

The judge's response to the first question was consonant with his jury instruction and controlling case law. The jury was instructed to compensate the plaintiff for any monetary loss occurring in the future, but also further instructed to reduce that lump sum to its present cash value. This is in accord with our holding in *Johnson* v. *Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.1975) (en banc).[2] To this Sun Oil agrees. It argues though that the judge's response to the second question was contradictory and erroneous. We agree. The second response could reasonably be construed to tell the jury not to discount its award of full compensation. That is contrary to the jury instructions, the answer to the first jury question and the law in

---

[2] *Penrod* was controlling at the time of this trial and it remains controlling since the mandate has yet to be issued in *Culver* v. *Slater Boat Co.*, 688 F.2d 280 (5th Cir 1982) (en banc), which overturns *Penrod*. Doubtless, *Culver* will govern if retrial is necessary.

this circuit. At a minimum it is the sort of question which absolutely required the district judge to confer with counsel before answering as he did. Because the jury may have reached a full compensation figure and then did not discount it to present value in compliance with the judge's answer, prejudice is obvious.

VI. The Interrogatories And The Claims Supervisor

Sun Oil contends that the judge's refusal to compel answers to interrogatories was erroneous. The judge's order provided that the Nations need not identify the names of expert witnesses to be called at trial. Sun Oil contends this was reversible error. Nations argues that the judge made the order because Sun Oil violated the trial court's local rule on the number of questions allowed in interrogatories. The trial judge has broad discretion in the control of discovery. *Scroggins* v. *Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976), and while the judge's unexplained actions here were highly unusual, they do not constitute an abuse of discretion, given the close connection between this case and the previous Howell and Falcone actions.

Sun Oil's final assignment of error asserts the judge should not have allowed the Home Insurance Company claims supervisor to testify. The witness testified as to the amount of Nations' compensation benefits and that medical expenses incurred were reasonable and necessary. Under Mississippi law, it is error for a trial court to allow counsel for an intervenor to introduce as a full exhibit the complete Workmen's Compensation Commission file on an employee's claim for compensation. *Merchants Co.* v. *Hutchinson*, 199 So.2d 813, 817 (Miss. 1967). Even though the entire file was not admitted into evidence here, the testimony of the claims supervisor as to the amount of benefits and expenses paid violates the spirit of the *Hutchinson* decision. However, Sun Oil has failed to show that it was prejudicial. The error is therefore harmless and not grounds for reversal. Federal Rule of Civil Procedure 61. If the damages section of the case is retired, the district judge should not allow the claims supervisor to testify.

VII. Conclusion

The district court is directed to conduct such further proceedings as may be necessary to find whether Mississippi Welding was a subcontractor of Sun Oil. If the company is such a subcontractor, the district court shall dismiss the action. If the company is found not to be a subcontractor of Sun Oil, then the district court is directed to retry the damage portion of the case in accordance with this opinion.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

May 23, 1983.

No. 82-4041

DOYLE NATIONS and MARIE NATIONS,
Plaintiffs-Appellees,

v.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Defendants-Appellants.

Welding company employee sued oil company to recover for personal injuries sustained in explosion at oil well site. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., rendered judgment for employee, and oil company appealed. The Court of Appeals, 695 F.2d 933, vacated and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held, inter alia, that: (1) applying retroactively the Mississippi Supreme Court's *Doubleday* decision, which held that a general or prime contractor that requires its subcontractors to protect their employees by providing workmen's compensation coverage is immune from suit, was not improper, since *Doubleday* did not overrule clear past precedent nor did it decide an issue of first impression that was not clearly foreshadowed; further, even were the Court of Appeals to find that *Doubleday* was "new law," retroactive application would still be proper under the two other prongs of *Chevron*, and (2) although, at the earlier trial of two other welding company employees who were also injured by the explosion, the issue of oil company being a statutory employer was raised and decided against the oil company, the doctrine of offensive collateral estoppel did

not preclude the oil company from raising the affirmative defense again in the instant suit.

Petition and suggestion denied.

D. Gary Sutherland, Hattiesburg, Miss., for defendants-appellants.

C. R. McRae, Pascagoula, Miss., Alfred Lee Felder, McComb, Miss., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 20, 5th Cir. 1983, 695 F.2d 933).

Before CLARK, Chief Judge, RUBIN and Williams, Circuit Judges.

PER CURIAM:

On petition for rehearing, appellee Doyle Nations urges this court to reverse its holding on several grounds. Four arguments require review.

Nations argues that Sun Oil, though it pleaded the statutory employer defense as an alternative affirmative defense, failed to present any evidence in support of the defense. This requires reversal of the panel opinion, he contends. *United States* v. *Indiana Bonding & Surety Co.*, 625 F.2d 26, 29 (5th Cir. 1980). The fact is, Sun Oil never had the opportunity in the second suit to prove the affirmative defense because of the court's application of offensive collateral estoppel.

Nations next contends that this court erred in retroactively applying *Doubleday* v. *Boyd Construction Co.*, 418 So.2d 823 (Miss. 1982). Nations did not raise this issue in his supplemental letter reply brief at the time of oral argument nor in his petitions for rehearing and rehearing en banc. The issue was not raised until Nations filed a brief supplementing his

post-decision petitions. Despite a recent decision cautioning against considering issues raised for the first time in reply briefs, *Knighten* v. *Commissioner*, 702 F.2d 59 at 60 n. 1 (5th Cir. 1983), we will consider the issue because of the unique procedural posture in which this question arises.

Under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 99, 92 S.Ct. 349, 351, 30 L.Ed.2d 296 (1971), decisions are not to be applied retroactively if: (1) the decision to be applied establishes a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) retroactive application will not further the purpose of the rule; and (3) retroactive application could produce substantial inequitable results. *Id.* at 106-107, 92 S.Ct. at 355-356.

Doubleday was not a clear change in Mississippi law. It was, however, a first-time application of long-standing statutory law to the facts present here. In that regard, *Doubleday* is best characterized as a development or clarification of existing law. The Mississippi Supreme Court relied upon two older cases, *Mosley* v. *Jones*, 224 Miss. 725, 80 So.2d 819 (1955), and *Mills* v. *Barrett*, 213 Miss. 171, 56 So.2d 485 (1952), in reaching its decision. In addition, the court's conclusion accords with a leading hornbook on workers' compensation law. See 2A Larson, Workmen's Compensation § 72.31(b) (1982). *Doubleday* did not overrule clear past precedent—it did not specifically reverse any prior cases—nor did *Doubleday* decide an issue of first impression that was not clearly foreshadowed. This decides the question since retroactivity is not at issue if there is no "new law."

Even were we to find that *Doubleday* is "new law," retroactive application would still be proper under the other prongs of *Chevron*. Nations claims injustice because Howell and Falcon, the two men killed at the work site, brought their action first. They won since *Doubleday* was not yet decided. We rejected Sun Oil's challenge to Nations' delay in bringing his action, finding that he had the right to await the full development of his

injuries within the statute of limitations period. But the other side of that coin is that should a plaintiff choose to wait, as he may, his case must be decided under the law then current. *Concerned Citizens of Vicksburg* v. *Sills*, 567 F.2d 646, 649-50 n. 5 (5th Cir. 1978). Nations complains that this is unjust because it deprives him of his jury award and it is wrong to award damages to Howell and Falcon and not him. We believe that injustice must be examined in terms of both parties. Aside from Nations' choice not to sue when his coworkers did, we note that Sun Oil required Mississippi Welding to carry workers' compensation insurance. It obviously did so to protect the workers' compensation interests while protecting itself from unlimited tort liability. As this court recently pointed out in *Stretton* v. *Penrod Drilling Co.*, 701 F.2d 441 (5th Cir. 1983), it is unfair to saddle employers with a liability against which they had no incentive to personally insure themselves. *Id.* at 444.

The last step in the retroactivity analysis is whether the purpose of the rule to be applied is supported by retroactive application. The purposes of this rule are to secure workers' uniform compensation insurance coverage and to protect employers from tort liability when they require their subcontractors to carry such coverage. Those purposes would clearly be supported by retroactive application. *Id.* at 445.

Nations' next argument is that Sun Oil is collaterally estopped from raising the issue of whether it was his statutory employer. At the earlier trial of Falcon and Howell, the issue was raised and decided against Sun Oil. Nations urges that the application of offensive collateral estoppel precludes Sun Oil from raising the affirmative defense again. We disagree.

We are guided by the difference in the scope and philosophy of res judicata and collateral estoppel. Res judicata is a doctrine of legal right. It is a bar against relitigation between parties to an initial suit. Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it. The discre-

tion vested in trial courts to determine when it should be applied is broad. *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979). Its application is controlled by the principles of equity. This court has previously admonished that fairness to both parties must be considered when it is applied. *Johnson* v. *United States*, 576 F.2d 606, 614 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981). We believe that such dual fairness dictates that *Doubleday* be applied here. For Nations, the application of current law is the result of his delay in bringing suit. His choice to await maturity of all sequela of his injuries and the decision in the Howell and Falcon case resulted in the intervention of the Mississippi Supreme Court's decision. That case laid to rest the central question of Nation's case. For us to ignore that would result in the rendering of a final decision which would obviously wrong Sun Oil under the current and controlling state law. The principles of equitable discretion relevant to both parties prohibit the use of collateral estoppel on the statutory employer question.

Finally, Nations contends that this panel erred in voiding an award of damages to his wife Marie. The error identified by the panel dealt with the discounting of an award to Doyle Nations based upon lost future earnings. Since Marie Nations' award was based solely on pain and suffering, the harmful communication between the judge and jury did not taint her award. Should the district court determine that Sun Oil is not Doyle Nations' statutory employer, then it need only retry his damages.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4041

DOYLE NATIONS and MARIE NATIONS,
Plaintiffs-Appellees,

vs.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

U.S. Court of Appeals
F I L E D
JUL 13 1983
Gilbert F. Ganucheau
Clerk

ON MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

Before CLARK, Chief Judge, RUBIN and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of intervenor, Home Insurance Company, for leave to file out time petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4041

D.C. Docket No. CA H81 "C"

DOYLE NATIONS and MARIE NATIONS,
Plaintiffs-Appellees,

vs.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

Before CLARK, Chief Judge, RUBIN and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

IT IS FURTHER ORDERED THAT defendants-appellants be condemned to pay one-third of the costs of appeal to be taxed by the Clerk of this Court; and that plaintiffs-appellees be condemned to pay two-thirds of said costs.

JANUARY 20, 1983

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4041

DOYLE NATIONS and MARIE NATIONS,
Plaintiffs-Appellees,

vs.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

U.S. Court of Appeals
F I L E D
JUN-6 1983
Gilbert F. Ganucheau
Clerk

ORDER:

☐ The motion of appellees for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of appellees for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 6, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the experation of the stay

granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____
for a further stay of the issuance of the mandate is DENIED.

/s/ CHARLES CLARK
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4041

DOYLE NATIONS and MARIE NATIONS,
Plaintiffs-Appellees,

vs.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

U.S. Court of Appeals
F I L E D
JUL 20 1983
Gilbert F. Ganucheau
Clerk

ORDER:

☐ The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or

upon the experation of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☒ The motion of Appellees for a further stay of the issuance of the mandate is GRANTED to and including August 1, 1983, under the same conditions as set forth in the preceding paragraph. NO FURTHER STAY OF MANDATE WILL BE GRANTED.

☐ The motion of Appellees for a further stay of the issuance of the mandate is DENIED.

/s/ CHARLES CLARK
Chief Judge

Office - Supreme Court, U.S
FILED
SEP 12 1983
ALEXANDER L. STEVAS,

No. 83-220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOYLE NATIONS AND MARIE NATIONS,
Petitioners,

v.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE RESPONDENTS IN OPPOSITION

D. GARY SUTHERLAND *
JOSEPH A. O'CONNELL
HEIDELBERG, SUTHERLAND
AND MCKENZIE
Post Office Box Number 1070
Hattiesburg, Mississippi 39401
(601) 545-8180
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT OF CERTIORARI	2
I. The Decision Below Does Not Raise the Question Presented in the Petition on the Scope of F.R.A.P. 28(j)	2
II. The Decision Below Does Not Expressly Address the Question Presented in the Petition on Sun Having Abandoned the Statutory Employer Defense by Failing to Raise the Issue in Either Its Original or Reply Brief	3
III. The Petitions' Contention That Sun's Failure To Raise the Statutory Employer Defense in Either the Appellants' Original or Reply Brief Constituted an Abandonment of the Issue Is Without Merit, Notwithstanding the Fifth Circuit's Failure to Expressly Address the Question	4
IV. The Petitioners' Argument on the Scope of Rule 28(j) Is Without Merit, Notwithstanding The Fifth Circuit's Failure to Address the Issue	5
V. A Decision By This Court On The Scope of Rule 28(j) Would Be Premature and Should Await Developments in the Law by the Federal Circuit Courts of Appeals	7
VI. The Alleged Conflicts Between the Decision Below and the Decisions Relied Upon by the Petitioners Do Not Exist and the Decision Below Is Easily Distinguishable On Its Peculiar Facts	7
A. Alleged Conflict with *Chevron Oil Company v. Huson*	7

TABLE OF CONTENTS—Continued

Page

B. Alleged Conflict with *Parklane Hosiery Company v. Shore* 10

VII. Reviewing the Decision Below Would Require The Court to Interpret State Law and Engage In Extensive Fact Canvassing 12

VIII. The Result Below Was Fair 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES — Page

Birtcher Corp. v. Diapulse Corp. of America, 17 L.Ed.2d 43, 87 S.Ct. 6 (1966) 13
Bruzewski v. United States, 181 F.2d 419, 421 (3rd Cir.) *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950) 11
Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971) 7, 8, 9, 10, 12
Concerned Citizens of Vicksburg v. Sills, 567 F.2d 646, 649-50 n.5, (5th Cir. 1978) 4
Doubleday v. Boyd Construction Co., 418 So.2d 823 (Miss. 1982) 4, 9, 10, 12, 13
Harris v. Plastics Mfg. Co., 617 F.2d 438 (5th Cir. 1980) 5
Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978), *cert. denied* 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981) 11
McCullough v. Kammerer Corp., 323 U.S. 327, 328, 89 L.Ed. 273, 65 S.Ct. 297 (1945) 2, 3
Meccano v. John Wanamaker Inc., 253 U.S. 136, 141, 64 L.Ed. 822, 826 (1920) 13
Municipal Bond Reporting Antitrust Lit., In re, 627 F.2d 436 (5th Cir. 1980) 5
Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) 10, 11, 12
Rachal v. Hill, 435 F.2d 59, 63 (5th Cir. 1970), *cert. denied*, 403 U.S. 904, 91 S.Ct. 2203, 29 L.Ed.2d 680 (1971) 11
Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. 1835 ..... 8, 9
Simpson v. Union Oil Co. of California, 411 F.2d 897 (9th Cir. 1969) 5
Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981) 11
United States v. Johnson, 268 U.S. 220, 227, 69 L.Ed.2d 925, 926 (1925) 13

RULES AND STATUTES

F.R.A.P. 28(j) 2, 5, 6, 7
Fifth Circuit Local Rule 10.1.11 5
Miss. Code Ann. § 71-3-71 (1972) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-220

DOYLE NATIONS AND MARIE NATIONS,
Petitioners,

v.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE RESPONDENTS IN OPPOSITION

The respondents, Sun Oil Company (Delaware) and Sun Production Company,[1] pray that this Court will deny the petitioners' request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in its cause number 82-4041.

COUNTER-STATEMENT OF THE CASE

The United States District Court for the Southern District of Mississippi, William Harold Cox, J., did not ex-

---

[1] Sun Company, Incorporated, is the parent corporation of the respondents, and their successor corporation is Sun Exploration and Production Company.

pressly collaterally estop the respondents from raising any affirmative defense. The trial court granted a partial summary judgment in favor of the petitioners on the question of liability. This partial summary judgment was based on an application of offensive collateral estoppel to the issue of whether Sun had been negligent. The Fifth Circuit concluded that the trial court had properly precluded Sun from relitigating the negligence issue.

The record in this case does not disclose whether Sun made any settlement offer to the petitioners, the circumstances under which such an offer was made or whether any such offer was communicated to the petitioners by their attorney.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

The Decision Below Does Not Raise the Question Presented in the Petition on the Scope of F.R.A.P. 28(j).

The petitioners' claim that that Fifth Circuit erred in allowing Sun to use F.R.A.P. 28(j) to brief an abandoned issue raises two separate contentions. The first is that Sun abandoned the statutory employer defense. The second is that F.R.A.P. 28(j) cannot be used to introduce an issue that was not previously briefed. Both of these contentions were made in the court below in the Nations' Petition for Rehearing. But the Fifth Circuit neither considered nor found it necessary to address the petitioners' second contention regarding the scope of F.R.A.P. 28(j), because it held (pet. app. B-13a) that Sun did not abandon the statutory employer defense. Since there was no abandoned issue, the question of whether Rule 28(j) could be used to raise such an issue no longer had any practical significance and, therefore, was not decided. Because the Court of Appeals did not pass upon the question, this Court has held that certiorari should not be granted to review it. *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328, 89 L.Ed. 273, 65 S.Ct. 297 (1945).

II.

The Decision Below Does Not Expressly Address the Question Presented in the Petition on Sun Having Abandoned the Statutory Employer Defense by Failing to Raise the Issue in Either Its Original or Reply Brief.

In the Petition for Rehearing which they filed in the court below, the Nations maintained that Sun abandoned the statutory employer defense, both by failing to present evidence supporting the defense at trial and by failing to assert the defense on appeal in either its original or reply brief. The Fifth Circuit ruled (pet. app. B-13a) that Sun's failure to adduce proof of the defense at trial did not constitute abandonment, because the trial court's order collaterally estopping relitigation of the liability question deprived it of the opportunity to do so. In their Petition for a Writ of Certiorari, the Nations have not controverted this ruling.

The Nations, however, do contend that the Fifth Circuit erred in allowing Sun to assert the statutory employer defense on appeal despite its failure to explicitly raise the issue in either its original or reply brief. However, the Fifth Circuit did not expressly address the question of whether Sun's failure to raise that affirmative defense in those briefs constituted abandonment. Instead, the Fifth Circuit necessarily implied in the opening paragraph of its opinion (pet. app. B-13a) that the Nations' argument on this point was one of the grounds urged on petition for rehearing which did not require review. Because the Court of Appeals did not pass upon the question, this Court has held that certiorari should not be granted to review it. *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328, 89 L.Ed. 273, 65 S.Ct. 297 (1945).

III.

The Petitions' Contention That Sun's Failure To Raise the Statutory Employer Defense in Either the Appellants' Original or Reply Brief Constituted an Abandonment of the Issue Is Without Merit, Notwithstanding the Fifth Circuit's Failure to Expressly Address the Question.

As noted above, the Fifth Circuit did not expressly address the question of whether Sun's failure to raise the statutory employer defense in either its original or reply brief constituted an abandonment of the issue. The Fifth Circuit simply noted in its opinion (pet. app. B-13a) that the Nations' argument on this point did not require review. Although the Fifth Circuit did not specifically explain why a review of the argument was unnecessary, the reason is nevertheless clear.

In both its initial opinion (pet. app. A-3a) and the opinion on the Petition for Rehearing (pet. app. B-15a), the Fifth Circuit emphasizes, citing *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 649-50 n.5 (5th Cir. 1978), that it is obligated to apply the law current at the time of its decision. Accordingly, the Fifth Circuit was *Erie*-bound to apply the development in Mississippi's statutory employer defense which was announced in *Doubleday v. Boyd Construction Co.*, 418 So.2d 823 (Miss. 1982). *Doubleday* was not decided by the Mississippi Supreme Court, however, until August 25, 1982, exactly two months after Sun mailed its reply brief to the Clerk of the Fifth Circuit. Because Sun had already filed both its original and reply briefs long before the *Doubleday* decision clarified the statutory employer defenses' applicability to this case, it was unable to include an argument based on *Doubleday* in either of those briefs or to raise the issue any sooner than it did. Therefore, Sun could not have abandoned the statutory employer defense on appeal before having an opportunity to assert it properly. Once the opportunity arose, Sun had the option of asserting the defense either by following the procedures

set forth in F.R.A.P. 28(j) or by filing a supplemental brief after moving the Clerk of the Fifth Circuit for the appropriate authority, pursuant to the Fifth Circuit's Local Rule 10.1.11. Sun elected to utilize the procedures of F.R.A.P. 28(j). Under those procedures, the Nations were given the opportunity to respond in a similar manner and did, in fact, file a supplemental letter reply brief which the Fifth Circuit then reviewed and considered.

In their Petition for a Writ of Certiorari, the Nations cite three cases to support their contention that Sun abandoned the statutory employer defense on appeal by failing to raise the issue in either its original or reply brief: 1) *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980); 2) *In re Municipal Bond Reporting Antitrust Lit.*, 627 F.2d 436 (5th Cir. 1980); and 3) *Simpson v. Union Oil Co. of California*, 411 F.2d 897 (9th Cir. 1969). Each of these cases is inapposite. They cover situations where, in spite of the absence of any impediment, there was either no proof supporting a claim or defense at trial or no discussion or argument supporting it in the appellate brief, even though there was an appropriate assignment of error in the brief and the legal authorities needed for developing the argument already existed. In this case, however, as noted, Sun had no opportunity at trial to prove any affirmative defense nor an opportunity on appeal to develop a substantial argument supporting the statutory employer defense until after the Mississippi Supreme Court handed down the *Doubleday* decision.

IV.

The Petitioners' Argument on the Scope of Rule 28(j) Is Without Merit, Notwithstanding The Fifth Circuit's Failure to Address the Issue.

The petitioners contend that F.R.A.P. 28(j) can only be used to bring the Court of Appeals' attention to recent decisions pertaining to a formal argument advanced in

either the appellant's original or reply brief. They insist that the rule cannot be used to notify the Court of Appeals of a recent development in the law, even when that development must be applied by the court in reaching its decision, if the legal contention in question has not been advanced previously in the briefs of the party asserting it.

Neither this Court nor any of the federal Circuit Courts of Appeals have ever attempted to define the scope of Rule 28(j), but it is clear that the petitioners' construction of the rule is unduly restrictive. The language of Rule 28(j) certainly does not create such limitations. A party to an appeal is permitted to identify the significance of recent decisions by making "a reference either to the page of the brief or to a point argued orally to which the citations pertain. . . ." Thus the rule itself draws a clear distinction between the points contained in a brief and any different and additional points made during oral argument, and permits both to be supplemented. The rule's language also permits a reference to any page of the brief and not just to those in the section of the brief containing the formal argument.

The language of Rule 28(j), therefore, clearly permits a party to bring the Court of Appeals' attention to a recent development in the law which gives new significance to factual points previously reviewed in its briefs, even if the claim or defense affected by that recent development was not formally argued. Any other interpretation of Rule 28(j) would be both illogical and impractical, given the fact that the Court of Appeals is obligated to apply such recent developments in the law if justice requires. No good reason exists, therefore, for preventing the parties to an appeal from using the simple and convenient procedures set forth in Rule 28(j) for such a purpose, especially since the rule also permits a response to be made by the opposing party. Requiring a party, desiring to notify the Court of Appeals of such a recent

development, to follow any other available procedures would only be more time consuming and expensive, but no more fair or effective.

V.

A Decision By This Court On The Scope of Rule 28(j) Would Be Premature and Should Await Developments in the Law by the Federal Circuit Courts of Appeals.

The scope of F.R.A.P. 28(j) is a matter of peculiar concern to the federal Circuit Courts of Appeals. Because none of the Courts of Appeals have attempted to define the scope of Rule 28(j), a decision by this Court on that issue would be premature and inappropriate. The Courts of Appeals should first be allowed to fashion judicial rules governing its use, since it is their operation which will be affected by those judicial rules. If a conflict arises, this Court can then resolve it.

VI.

The Alleged Conflicts Between the Decision Below and the Decisions Relied Upon by the Petitioners Do Not Exist and the Decision Below Is Easily Distinguishable On Its Peculiar Facts.

A. Alleged Conflict with *Chevron Oil Company v. Huson.*

The petitioners maintain that the Fifth Circuit's decision is in conflict with *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971). The basis for this alleged conflict is not any failure by the Fifth Circuit to apply *Chevron Oil Co.*'s tests for determining when judicial decisions should be retroactively applied. As the Fifth Circuit's opinion on the Petition for Rehearing discloses (pet. app. B-14a, 15a), these tests were methodically and meticulously applied in the court below, and the petitioners do not contend otherwise. Instead, the petitioners claim that those legal tests were misapplied to the facts of this case, producing a result at

variance with the one reached in *Chevron Oil Co.* in spite of the similarities between the two cases.

However, as the Fifth Circuit's opinion demonstrates, (pet. app. B-14a, 15a), the facts of this case are plainly distinguishable from those of *Chevron Oil Co. v. Huson*, and those factual differences readily account for the differing conclusions reached in the two decisions.

In *Chevron Oil Co. v. Huson*, this Court declined to apply retroactively one of its decisions, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed 2d. 360, 89 S.Ct. 1835, holding that state law remedies, rather than admiralty law remedies, were applicable to actions based on the Outer Continental Shelf Lands Act. If it had retroactively applied *Rodrigue*, it would have found that the Louisiana statute of limitations barred the action. In deciding against retroactive application, this Court considered the three factors or tests for which *Chevron Oil Co.* is frequently cited. The Court first noted that *Rodrigue* unforeseeably overturned a long line of Fifth Circuit decisions holding that admirality law, including the doctrine of laches, governed actions under the Outer Continental Shelf Lands Act. 30 L.Ed 2d at 306, 44 U.S. at 107. It also found that retroactive application would produce substantial inequitable results, because it could not have been foreseen that a definite time limitation would be subsequently imposed. This made it unfair to punish a party for sleeping on his rights. 30 L.Ed 2d at 306-07, 404 U.S. at 107-08. Finally, the Court concluded that retroactive application would undermine one of the underlying purposes of the Lands Act, since the Act had been designed to afford familiar remedies and the change in the law produced by *Rodrigue* was completely unforeseeable. 30 L.Ed 2d at 306, 404 U.S. at 107-08.

By contrast, in the decision below the Fifth Circuit does not analyze judicial decisions determining whether state or admiralty law governs actions under the Outer Con-

tinental Shelf Lands Act, but interprets a line of decisions defining the scope of the statutory employer defense under Mississippi's workmen's compensation laws (pet. app. B-14a). In *Chevron Oil Co. v. Huson*, this Court held that *Rodrigue* overruled clear past precedent on which the litigants had relied, but the Fifth Circuit found (pet. app. B-14a) that *Doubleday v. Boyd Construction Co.*, 418 So.2d 823 (Miss. 1982), which held that prime contractors who require their subcontractors to provide workmen's compensation coverage are immune from suit, neither overruled clear past precedent nor decided an issue of first impression that was not clearly foreshadowed. The Fifth Circuit noted (pet. app. B-14a) that in deciding *Doubleday*, the Mississippi Supreme Court relied on two of its earlier cases, and that the *Doubleday* decision was also in accord with the leading hornbook on workmen's compensation law.

The Fifth Circuit also found that a retroactive application of the *Doubleday* decision would support the underlying purposes of Mississippi's statutory employer defense (pet. app. B-15a), since the purposes of the rule were to secure uniform compensation coverage and protect employers requiring subcontractors to obtain such insurance from tort liability, but would not produce injustice (pet. app. B-14a, 15a). The Nations claim that it would be unjust to deprive them of their damage award when the families of two coworkers injured in the same accident have recovered the jury verdicts previously awarded to them. But the Fifth Circuit noted (pet. app. B-15a) the Nations had freely chosen to delay the filing of their suit. Because they elected not to file suit with the coworkers, they had to accept the risk that the case would be decided under clearly foreshadowed, intervening legal precedents (pet. app. B-15a). Moreover, the intervention of the *Doubleday* decision did not deprive the Na-

tions of all compensation. It simply created the possibility that, if the trial court subsequently determined Sun satisfied the statutory employer criteria of *Doubleday*, the Nations would only be entitled to recover the workmen's compensation benefits which they had already been paid by the intervenor, Home Insurance Company.

Therefore, it is clear the decision below is not in conflict with *Chevron Oil Co. v. Huson*. By holding that retroactive application was proper, the Fifth Circuit did reach a different result from the one in *Chevron Oil Co.*, but the particular facts of this case alone account for that difference.

B. Alleged Conflict with *Parklane Hosiery Company v. Shore*.

The Fifth Circuit held (pet. app. B-15a, 16a) that the doctrine of collateral estoppel should not be applied offensively to preclude Sun from asserting the statutory employer defense. The petitioners claim this ruling not only conflicts with the decision of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), but actually rejects *Parklane's* holding on the application of offensive collateral estoppel. Although the petitioners do not explain how the decision below rejects *Parklane* or where the alleged conflict lies, their contention is clearly erroneous.

Under federal collateral estoppel rules, there are three necessary criteria which must be satisfied before the doctrine will be imposed in a particular case: 1) the issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior litigation; and 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action.

Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981); *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). But even though satisfying these three criteria is necessary for an application of collateral estoppel, that alone is never sufficient. The court must also evaluate the facts and circumstances of each particular case to determine whether the doctrine's application should be prevented by equitable considerations of fairness to the litigants. *Johnson v. United States*, 576 F.2d 606, 614 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981); *Rachal v. Hill*, 435 F.2d 59, 63 (5th Cir. 1970), *cert. denied*, 403 U.S. 904, 91 S.Ct. 2203, 29 L.Ed.2d 680 (1971); *Bruzewski v. United States*, 181 F.2d 419, 421 (3rd Cir.), *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950).

As it emerges in their Petition for a Writ of Certiorari, however, the Nations' position is that once a party meets the three criteria cited above, he becomes entitled to have collateral estoppel imposed as a matter of legal right. This position, however, is clearly erroneous, as the decisions cited above reveal. In the decision below (pet. app. B-15a, 16a), moreover, the Fifth Circuit notes that although res judicata is a doctrine of legal right, collateral estoppel is an equitable doctrine which can be applied in the court's discretion only when it is warranted by the legal and factual issues in the case. Citing *Parklane* (pet. app. B-15a, 16a), the Fifth Circuit also notes that the discretion vested in the courts to determine when offensive collateral estoppel should be applied is broad.

In evaluating the equitable considerations created by the legal and factual issues in this case (pet. app. B-16a), the Fifth Circuit concluded that it would be fundamentally unfair to preclude Sun from asserting the statutory employer defense. The Nations had chosen to de-

lay bringing their suit, and the result of this choice was that *Doubleday* resolved the central question of the case. Sun, on the other hand, would obviously be wronged by the entry of a final judgment which denied its rights under current and controlling Mississippi law.

Thus, the Fifth Circuit's refusal to collaterally estop Sun from asserting the statutory employer defense was plainly based on the peculiar facts of this case. Its decision is not in conflict with *Parklane*, but was actually decided in accordance with the principles of equitable discretion required by *Parklane*, 439 U.S. at 331, 58 L.Ed.2d at 562.

VII.

Reviewing the Decision Below Would Require The Court to Interpret State Law and Engage In Extensive Fact Canvassing.

As the preceding section of this brief demonstrates, the conflicts alleged by the petitioners turn on interpretations of both Mississippi law and the facts of the case. Their contention that the Fifth Circuit misapplied the retroactive application tests of *Chevron Oil Co. v. Huson* ultimately depends on an interpretation of whether *Doubleday* made a clear change in Mississippi law, as well as an interpretation of the underlying purposes of Miss. Code Ann. § 71-3-71 (1972). The resolution of this question also requires an extensive review of the facts of the case to determine whether retroactive application would produce substantial inequitable results.

The alleged conflict with *Parklane* consists of the Fifth Circuit's failure to collaterally estop Sun from raising the statutory employer defense. Because the Fifth Circuit is permitted to exercise broad discretion in determining whether the equitable considerations present in the case

warrant the application of collateral estoppel, the ultimate question to be resolved is whether the Fifth Circuit's evaluation of the case's equitable considerations constitute a clear abuse of discretion. The resolution of this ultimate question would require an extensive evaluation of the legal and factual issues in the case.

Therefore, in order to settle the questions presented by the petitioners on collateral estoppel and retroactive application of judicial decisions, this Court would have to construe Mississippi law and engage in extensive fact canvassing. The Court would also have to determine whether the Fifth Circuit properly exercised its broad discretion to deny the imposition of collateral estoppel. This Court has ruled, however, that these are not tasks to be served by a grant of certiorari. *Birtcher Corp. v. Diapulse Corp. of America*, 17 L.Ed.2d 43, 87 S.Ct. 6 (1966); *United States v. Johnson*, 268 U.S. 220, 227, 69 L.Ed.2d 925, 926 (1925); *Meccano v. John Wanamaker, Inc.*, 253 U.S. 136, 141, 64 L.Ed. 822, 826 (1920).

VIII.

The Result Below Was Fair.

Under current and controlling Mississippi law, the Nations' exclusive remedy consists of the benefits allowed under Mississippi's workmen's compensation laws. They have already received all of the compensation benefits to which they are entitled. It would not be unfair to the Nations, therefore, for *Doubleday* to be applied in this case. They knowingly accepted the risk of delaying their suit, and, in any event, are not entitled under current law to the jury award they seek to preserve. On the other hand, the failure to apply *Doubleday* would be grossly unfair to Sun. Such a failure would impose a burden on Sun for which it is not liable and from which it sought protection by requiring its subcontractors to obtain workmen's compensation coverage.

CONCLUSION

Not only are the reasons for granting certiorari advanced by the petitioners without merit, but there are many additional reasons, as explained above, for denying the issuance of such a writ in this case. Therefore, the respondents, Sun Oil Company (Delaware) and Sun Production Company, are entitled to have this Court deny the request of the petitioners, Doyle and Marie Nations, for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

D. GARY SUTHERLAND *
JOSEPH A. O'CONNELL
HEIDELBERG, SUTHERLAND
AND MCKENZIE
Post Office Box Number 1070
Hattiesburg, Mississippi 39401
(601) 545-8180
Attorneys for Respondents

* Counsel of Record

Dated: September 12, 1983.